United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

74-2131

B

P/S

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

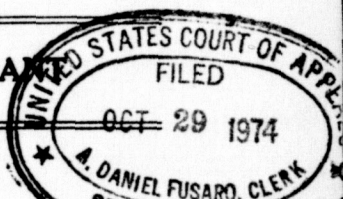
MILDRED IVES, MOIRA ROBERTSON & JOYCE CHAPMAN,
on behalf of themselves and others similarly situated,
Plaintiffs-Appellees,

vs.

W. T. GRANT COMPANY,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF OF DEFENDANT-APPELLANT



WILLIAM J. EGAN,
J. MICHAEL EISNER,
DAVID A. REIF,
Attorneys for Defendant-Appellant

WIGGIN & DANA
205 Church Street
P. O. Box 1832
New Haven, Connecticut 06508
Telephone: Area 203, 787-4261

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Rules & Regulations

Statutes

Legislative History

Federal Reserve Board Letters

Books & Articles

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 74-2131

MILDRED IVES, ET AL.,
Plaintiffs-Appellees,

vs.

W. T. GRANT COMPANY,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT
NEWMAN, J. APPROVING ORDER OF LATIMER, M.

BRIEF OF DEFENDANT-APPELLANT

Statement of Issues

Did the Court err in holding that there was Federal subject matter jurisdiction over claims arising under the State of Connecticut's Truth-in-Lending Act, Connecticut General Statutes §36-393, *et. seq.?*

Did the Court err in holding that the defendant's disclosures violated the State of Connecticut's Truth-in-Lending Act, Connecticut General Statutes §36-393, *et. seq.?*

Did the Court err in holding that the defendant's coupon credit plan violated the State of Connecticut's usury law, Connecticut General Statutes §37-4?

Did the Court err in holding that the defendant's coupon credit plan violated the State of Connecticut's Small Loan Act, Connecticut General Statutes §36-225, *et. seq.*?

Did the Court err in granting injunctive relief absent a showing of irreparable injury or lack of an adequate remedy at law?

Did the Court err in holding that individual notice to the absent members of the class was not required?

Statement of the Case

The Complaint in this action contains 13 counts and represents a broad scale attack on the coupon credit plan of the W. T. Grant Company, (App. pp. 13a to 35a). Only Counts I, II, IX, X and XII are involved in this appeal. Counts I and II of the Complaint allege violations of the Connecticut Truth-in-Lending Act, Connecticut General Statutes §36-393, *et. seq.* Counts IX and X allege Grant's coupon plan is usurious in violation of §37-4 of the Connecticut General Statutes. Count XII alleges that the defendant violated §36-225 *et. seq.* of the Connecticut General Statutes (Connecticut Small Loan Act).

The three named plaintiffs entered into retail sales contracts with the defendant W. T. Grant Company for the purchase of coupon books.[1] The plaintiffs have brought the suit on their own behalf and on behalf of a class consisting of "all persons who have signed W. T. Grant Company retail installment contracts for the sale of coupons on which the actual annual percentage rate of interest is greater than 12% in the State of Connecticut" (Complaint ¶5 App. p. 14a). The plaintiffs seek, *inter alia*, a declaratory judgment that the contracts in question violate the Connecticut Truth-in-Lending Act, the Connecticut Usury Law, and the Connecticut Small Loans Act; injunctions against Grants entering into further such contracts and making collections on existing contracts; actual and punitive damages; and attorneys' fees and costs.[2]

---

1. An explanation of the coupon plan is contained in Addendum A.

2. Most of these claims were made before on behalf of a purported class which included these named plaintiffs in the case of *Givens, et. al. v. W. T. Grant Company*, 457 F.2d 612 (2d Cir.) *vacated and remanded on other grounds*, 409 U.S. 56 (1972). As the District Court noted in a prior ruling in this case:

> *Ives* was commenced in this Court shortly after the Court of Appeals initially ordered dismissal of *Givens*, with plaintiffs represented by the same attorneys; the complaint in *Ives* joins state law claims virtually identical with those alleged in *Givens* with several further claims purportedly arising under federal law. (App. p. 75a)

On October 12, 1972 defendant moved to dismiss Counts III through XIII of the Complaint for failure to state a cause of action or lack of federal subject matter jurisdiction. On February 19, 1973 this motion was denied on the then existing record without prejudice (App. p. 73a).

Subsequently the parties and the Court agreed on a procedure to prepare the record for a hearing on motions pending and contemplated by both parties. (App. p. 96a) The record prepared for these purposes comprised:

(1) Defendant's Answers to Plaintiffs' Request to Admit (App. pp. 55a-56a)

(2) Defendant's Answers to Interrogatories (App. pp. 60a-71a)

(3) Stipulation of Fact and Law (App. pp. 116a-129a)

(4) Stipulation to Submission of Documents (App. pp. 152a-155a)

(5) Affidavit of Mildred Ives (App. pp. 157a-158a)

(6) Affidavit of Robert J. Kelly, Esq., General Counsel of the defendant (App. pp. 98a-110a)

(7) Affidavit of Richard S. Nash, Assistant Vice President of Continental Insurance Company which provides credit life insurance and credit health and accident insurance to those purchasers of coupon books who elect to purchase such insurance. (App. p. 111a)

On that record the Court heard the following motions:

(1) Defendant's motion to dismiss Counts I and II for lack of jurisdiction;

(2) Defendant's renewed motion to dismiss Counts III-XIII for lack of jurisdiction or failure to state a claim;

(3) Plaintiffs' motion for certification as a class confined to the claims for declaratory and injunctive relief under Fed. R. Civ. P. 23(b)(2)

(4) Plaintiffs' motion for partial summary judgment as to Counts I and II (Truth-in-Lending), Count

III (Retail Installment Sales Act), Counts IX and X (Usury), Count XII (Small Loan Act), and for a preliminary injunction.

By order dated March 13, 1974, (App. p. 159a) the Court ruled as follows with respect to those motions:

> (1) Denied defendant's motion to dismiss Counts I and II of the Complaint for lack of subject matter jurisdiction;
>
> (2) Denied defendant's renewed motion to dismiss Counts IX, X and XII of the Complaint for lack of jurisdiction and denied without prejudice defendant's renewed motion to dismiss Counts III-VIII, XI and XIII for lack of jurisdiction or failure to state a claim.
>
> (3) Granted plaintiffs' motion for partial summary judgment as to Counts I, II, IX, X and XII of the Complaint and denied it with respect to Count III of the Complaint;
>
> (4) Granted plaintiffs' motion for certification as a class action confined to declaratory and injunctive relief.[3]

Pursuant to Rules 54(b) and 56(c) of the Federal Rules of Civil Procedure, the Court ordered judgment entered for the plaintiffs and the class they represent:

> 1. "Declaring defendant liable under 15 U.S.C. §1640[4] in the limited respects set forth above, and in violation of Conn. Gen. Stat. §§36-243 and 37-4; and
>
> 2. Enjoining defendant from collecting any further payments under outstanding coupon contracts

3. The Court defined the class as:

"All persons presently indebted to the W. T. Grant Company on coupon contracts signed in Connecticut and on which the actual annual percentage rate of interest exceeds twelve percent, excluding those debtors for or against whom the common questions presented by Counts I, II, IV, V, IX, X and XII have been adjudicated prior to the commencement of the instant action." (App. pp. 166a-167a)

4. The Court's reference to the federal statute was apparently inadvertent. The plaintiffs' truth-in-lending claims were made under §36-393 *et. seq.* of the Connecticut General Statutes. Complaint Counts I and II. (App. pp 15a-17a)

made in Connecticut, and from entering hereafter into any coupon contracts in Connecticut on which the annual percentage rate exceeds twelve percent and without first providing required truth in lending disclosures." (App. p. 183a)

On April 25, 1974 judgment was entered. It is from this judgment that the defendant appeals.

ARGUMENT

I

THE FEDERAL DISTRICT COURT HAS NO JURISDICTION OVER CLAIMS ARISING UNDER THE TRUTH-IN-LENDING LAW OF THE STATE OF CONNECTICUT.

On July 20, 1970 the Federal Reserve Board, pursuant to 15 U.S.C. §1633 and 12 C.F.R. §226.12, Supp. III (e), 35 F.R. 5215, granted Connecticut an exemption from the Federal Truth-in-Lending Act. 35 F.R. 11992 (July 25, 1970). However, the F.R.B. attempted to grant only a partial exemption by providing that:

> No such exemption shall be deemed to extend to the civil liability provisions of Sections 130 [15 U.S.C. §1640] and 131 [15 U.S.C. §1641]; and . . . the disclosure requirements of the applicable State law shall constitute the disclosure requirements of this Act. . . .
>
> 12 C.F.R. §226.12(e).

It is defendant's position that 15 U.S.C. §1633 does not empower the F.R.B. to limit an exemption in this manner. Therefore, 15 U.S.C. §1640(e) does not provide an independent ground for federal jurisdiction over state law claims.

A. The Language Which Congress Employed In 15 U.S.C. § 1633 Clearly States Congress' Intention That State Law Shall Pre-empt Federal Law.

Section 1633 is entitled "Exemption for State-regulated transactions" and provides as follows:

> The Board shall by regulation exempt from the requirements of this part any class of credit transactions within any State if it determines that under the law of that State that class of transactions is subject to requirements substantially similar to those imposed under this part, and that there is adequate provision for enforcement.

The plain meaning of this provision is that an "exemption" is to be just that: it is to exempt the class of credit transactions subject to state law "from the requirements of this part", i.e., from every section of Part B of Chapter 41 of Title 15 of the U.S. Code, including §1640(e), the jurisdictional section. Nowhere is there any modifier of the word "exemption" or any other suggestion than an exemption could somehow apply only to certain sections of Part B. The only manner in which an exemption can be "partial" is if the state law limits itself to certain classes of transactions covered by the federal law; in such case an exemption would apply only to that class of transactions covered by the state law and would thereby be a "partial" exemption only in the sense that the other requirements of federal law, not addressed by the state legislation, would continue in force. Furthermore, the choice of the word "exemption" makes it clear that Congress contemplated immunity from the reach of federal law. The word "exemption" is synonymous with "freedom" and is defined as "freedom from any charge, burden, . . . etc., to which others are subject; immunity . . ." 1 Webster's Second International Dictionary.

B. The Legislative History Decisively Establishes That Pre-emption Was The Congressional Goal Behind State Exemption.

The legislative history not only supports the choice of the term and its clarity, but indicates that pre-emption was the goal. Senator Proxmire, the driving force behind the Senate Bill (S. 5), emphasized that the exemption provision

[§ 6(b) of S. 5] was intended to enable the states to gradually pre-empt the regulatory field. During the Senate Hearings Senator Proxmire assured Senator Bennett and Attorney General Bronson LaFollette of Wisconsin that fears about pre-emption of Wisconsin statutes were ill-founded. "[T]here is no conflict between the Federal Government and the States on this matter. Any State can exempt itself from the proposed Federal law by enacting equivalent disclosure provisions." Hearings on S. 5 Before the Subcommittee on Financial Institutions of the Committee on Banking and Currency, 90th Cong., 1st Sess. at 281 (1967) (hereinafter "Senate Hearings"). At Senator Proxmire's request, the General Counsel of the Treasury submitted a memorandum addressed to this issue which was made part of the Senate Hearings. It confirmed Chairman Proxmire's view and predicted that the pre-emption features of the bill would assure a diminishing federal and an expanding state role as the F.R.B. issued exemptions:

> Section 6 of S. 5 clearly indicates that state laws requiring disclosure of credit information are to remain valid and in force unless directly inconsistent with the provisions of the Act. Beyond that, the legislative scheme plainly contemplates that federal requirements would not be applicable to credit transactions regulated by state law requiring substantially the same information as the section 4 of the bill. Section 6(b) explicitly authorizes the Federal Reserve Board to exempt such transactions. To conclude that S.5 exhibits an intent by Congress to exclude states from enacting similar credit disclosure laws, or that, at best, the intent is ambiguous and must cause the courts to invalidate consistent state action is patently unreasonable. To go one step further and conclude that S. 5 would be deemed by the courts "to have pre-empted a large part of the field of consumer credit regulation which traditionally has been left to State control," is that much more unreasonable.

Senate Hearings at 451-452.

* * *

Moreover, the design of the bill is that, as state legislatures promulgate disclosure statutes which are substantially as protective as the federal Truth-in-Lending Act, increasing numbers of credit transactions would be exempted from coverage under the federal law. *Federal involvement in the area would subsequently diminish and assume a secondary position, leaving the primary truth-in-lending responsibility to the States.* (emphasis added)

Senate Hearings at 452.

The testimony of J. L. Robertson, Vice Chairman of the Board of Governors of the Federal Reserve System, is of special significance, since he not only assumed that state law would pre-empt federal law, but urged a technical amendment to make it easier for the Board to grant exemptions. The original §6(b) differed from §1633 in that the former provided for exemptions of state-regulated transactions which the Board "determines are effectively regulated under the laws of any State so as to require the disclosure by the creditor of the *same information* as is required under section 4 of this Act." (emphasis added) Governor Robertson, in a prepared statement, urged a modification in order to encourage state legislation:

We believe that section 6(b) of the bill should be modified. That section now provides that the implementing agency shall exempt from the act any credit transactions which it determines are effectively regulated under the laws of any State so as to require the disclosure by the creditor of the same information as required under S. 5. We seriously doubt that a Federal agency should be called upon to judge how effectively State laws in this field are enforced, particularly where, as in the case of S. 5, they are enforced in the courts. Action at the State level should be encouraged, not discouraged, by enactment of S. 5, and it should be made clear that the States need not follow precisely

> the provisions of this bill. You have indicated during the hearings, Mr. Chairman, that this is your intent, but we think it should be spelled out in the bill. The Board recommends, therefore, that section 6(b) be amended to exempt transactions that are determined to be subject to State law that requires disclosure substantially similar to that required under S. 5.
>
> Senate Hearings at 666.

In a discussion following the introduction of this statement, Governor Robertson said that "[a]s I understand this whole proposal, one of the purposes is to encourage States to do this sort of job themselves. As a matter of necessity the Federal Government has considered taking the first step. As soon as a State enacts a similar law you exempt that State." Senate Hearings at 677.

Finally, Governor Robertson made it clear that an exemption would remove the Federal government entirely. The following is a colloquy between Governor Robertson and Senator Brooke:

> Senator BROOKE. At page 15 I take it your amendment with respect to section 6(b) is that all a State needs to do to get out of S. 5 would be to pass a law requiring disclosure substantially similar to that required by S. 5?
>
> Mr. ROBERTSON. That is right.
>
> Senator BROOKE. If a State did nothing to enforce, you would still permit a complete exemption from S. 5?
>
> Mr. ROBERTSON. I personally would, because in the first place I have confidence that if States are going to enact legislation they will enforce the legislation. They may not do it—some may do it better than others. But I don't think the Federal Government ought to be in the position of deciding whether their courts have acted properly or whether their State officials have acted properly. It seems to me that this is up to the State government.

Senator BROOKE. You would leave it to the State?
Mr. ROBERTSON. I would.
Senate Hearings at 681.

The Senate Report, issued in June, 1967, shortly after the hearings (which were held in April and May), also made it clear that state laws were to pre-empt the federal law. "The Committee is . . . hopeful that the provision under section 6(b) whereby creditors will be exempt from compliance with the Federal law if their State enacts substantially similar legislation, will serve as an incentive to the States to act favorably upon the proposed consumer credit code. In this respect the committee believes the Federal truth in lending law and the proposed consumer credit code are supplementary rather than competing alternatives." S.Rep. No. 392, 90th Cong., 1st Sess. 89 (1967) (hereinafter "S.Rep."). The Report also reviewed the changes made at Governor Robertson's suggestion:

> *Exemption when State laws are similar.* This section permits the Board to exempt creditors from the Federal law if State law requires similar disclosures.
>
> This section is similar to the original S. 5 except that the Board can exempt creditors covered by a State law which is "substantially similar" to the Federal law. The original version of S. 5 only authorized exemptions if the State law required the "same information." Also the provision was reworded to make it clear the Board is only responsible for reviewing the law and not the effectiveness of the administration of the law. These changes are in line with Governor Robertson's suggestions.
>
> S.Rep. at 21.

It is significant that there was no contemplation of the issuance of partial exemptions for classes of transactions which were exempted, nor was there any distinction drawn between administrative and judicial enforcement.

Senator Bennett's individual views are also of interest, especially his concluding statement that "it is my firm hope

that the States will continue in their efforts to improve their consumer credit legislation and thus make this Federal bill both unnecessary and inoperative." S. Rep. at 24. Needless to say, he contemplated that the exemption would pre-empt federal law.

Finally, there was discussion on the Senate floor on July 11, 1967. Senator Bennett again stated that his support for the bill was because of the pre-emption feature:

> One of my objections to the original bill grew out of the fact that I felt the whole problem belonged at the State level. I am now supporting a bill at the Federal level.
>
> One of the main features of the bill is that it contains the provisions that I am about to read. It begins by saying:
>
> The Board—
>
> And that word refers to the Federal Reserve Board which, under the bill, will have the responsibility of writing the regulations under which this would operate:
>
> The provision in the bill reads:
>
> > The Board shall by regulation exempt from the requirements of this act any class of credit transactions which it determines are subject to any state law or regulation which requires disclosures substantially similar to those required by Section 4 and contains adequate provisions for enforcement.
>
> The bill, in other words, provides that if the States enact legislation which accomplishes substantially the same purpose, and which satisfies the Board as to its efficacy, the Board can then withdraw from enforcement of this act in that State and the State authorities can take up the enforcement of their local laws in place of the act.
>
> We have had a group known as the National Commissioners on Uniform State Laws, appointed by State Governors. That group has been working for a number of years on this and other consumer problems.

> We expect that shortly they will present us and the United States with proposed uniform State legislation. By acting now, we will be laying down some guidelines for men who are working on the proposed uniform State laws. So they can have hope that when their uniform laws have in fact been adopted, their State enforcement agencies can take over the job of enforcing legislation of this type, and that is where I believe it belongs. So I am delighted that this provision is in the bill.
>
> This provision not only eliminates any need for a new, vast Federal establishment to police the law, but it also preserves in a unique and practical way my original position that this law should be administered at the State level rather than at the Federal level.
>
> 113 Cong. Rec. 18409 (July 11, 1967).

And Senator McIntyre indicated that the pre-emption features were among the few parts of the bill which appealed to him:

> Another objection which I have to this bill, as well as to its predecessors, goes to the appropriateness of congressional action in what has traditionally been an area subject to State regulation. Practically every State in the Union already has consumer credit legislation on the books, but in one fell swoop the Congress is preparing to enter, and practically pre-empt the field.
>
> I must point out that my colleagues on the Banking and Currency Committee are aware that the primary responsibility for the administration of consumer credit legislation should lie with the States. Section 6 of the bill before us provides those circumstances under which State law and State administration *will pre-empt the operation of the Federal law.* (emphasis added)
>
> 113 Cong. Rec. 18413 (July 11, 1967).

Significantly, no one corrected or disagreed with either Senator. It was clear that the bill contemplated pre-emption pursuant to the exemption provisions and not concur-

rent jurisdiction. Additionally, we are not aware of any statement in the legislative history suggesting that concurrent jurisdiction of federal and state courts was contemplated by the exemption provision. Indeed, a review of the legislative history reveals that one of the major objections to the bill was the fear of expanding federal control. Only because of the pre-emptive features of § 6b [§ 1633] did Senators such as Wallace F. Bennett support the Act in his statements.

Thus, it is beyond doubt that the plain meaning of section 1633 is that an exemption shall result in the pre-emption of the federal law by the state law. The legislative history affirms this plain meaning and contains absolutely nothing to suggest otherwise. Had Congress meant otherwise, presumably it would have said so. *See Florida Lime & Avocado Growers, Inc.* v. *Paul,* 373 U.S. 132 (1963) ("Other provisions of the Act, and their history, militate even more strongly against federal displacement of these state regulations." at 148; "Had Congress meant the Act to have a pervasive effect upon the ultimate distribution and sale of produce, evidence of such a design would presumably have accompanied the statute." at 150; *Utah Junk Co.* v. *Porter,* 328 U.S. 39 (1946) (Frankfurter, J.) (statutory interpretation of Price Administrator struck down on the basis of the clarity of the Congressional language and the legislative history.)

Since 12 C.F.R. §§226.12(c) (1) & (2), are repugnant to the language of §1633 and the intent of Congress, it was beyond the authority of the F.R.B. to promulgate them and they are, therefore, null and void. However, the invalidation of these two sections does not affect the validity of the exemption granted to Connecticut effective August 1, 1970 because that exemption was authorized by 15 U.S.C. §1633.

C. The District Court Erred In Following Wolf v. H. P. Hallock Company.

The District Court relied heavily on Magistrate Latimer's decision in *Wolf* v. *The H. P. Hallock Co.,* Civil No. 15,675

(D. Conn. 1973). The Opinion in *Wolf* is reproduced in the Appendix at p. 185a. The rationale of the Court's reasoning in *Wolf* is that (1) the legislative history is unclear with respect to the effect of an exemption on federal jurisdiction, (2) the Board's construction must be granted "great deference" by the Court, and (3) the decision to find jurisdiction is "not inconsistent" with the Act's purpose of assuring disclosure. Defendant submits that in *Wolf* the Court erred on all three points. The legislative history is not at all unclear but unmistakably conveys Congress' intention that an exemption shall result in preemption. Secondly, the doctrine of "great deference" is inapplicable since the issue of federal jurisdiction is not within the F.R.B.'s area of expertise. Finally, where Congress has clearly spoken, and limited the district court's jurisdiction, the court cannot substitute its judgment for that of Congress and extend its own jurisdiction because in the court's opinion to do so would better effectuate the Congressional purpose. Where an agency's action is inconsistent with an obvious Congressional intent, the action is invalid. *Espinoza* v. *Farah Mfg. Co., Inc.*, 414 U.S. 86 (1973); *accord, Morton* v. *Ruiz*, U.S. , 94 S.Ct. 1055, 1075 (1974).

Defendant has set forth the legislative history above and shall not repeat it here except to emphasize that every Senator who spoke out on the issue believed that he was voting for a pre-emption provision. No one even suggested that concurrent jurisdiction was a possibility and the thrust of the debate was that §6(b)['633] pre-emption made the statute palatable to those Senators who were concerned about displacement of state law.

1. The Doctrine Of "Great Deference" Is Inapplicable Where The Issue Is Beyond The Power Of The Agency To Decide And Does Not Involve The Exercise Of Agency Expertise.

The Supreme Court has repeatedly held that in regard to questions involving jurisdiction the doctrine of "great

deference" is inapplicable. *See, e.g., Social Security Bd.* v. *Nierotko*, 327 U.S. 358, 369 (1946) ("An agency may not finally decide the limits of its statutory power. That is a judicial function."); *East Texas Motor Freight Lines, Inc.* v. *Frozen Food Express*, 351 U.S. 49, 54 (1956) ("The Commission is the expert in the field of transportation. . . . But Congress has placed limi on its statutory powers; and our duty . . . is to determine those limits."); *Leedom* v. *Kyne*, 358 U.S. 184 (1958); *Barlow* v. *Collins*, 397 U.S. 159, 166 (1970) ("On the contrary, since the only or principal dispute relates to the meaning of the statutory term, the controversy must ultimately be resolved, not on the basis of matters within the special competence of the Secretary, but by judicial application of the cannons of statutory construction."); *cf. Crowell* v. *Benson*, 285 U.S. 22 (1932).

The Board of Governors of the Federal Reserve has no expertise to exercise in regard to the limits of their own power under the Act or the jurisdiction of the federal courts; these questions are within the special expertise of the courts. The two cases cited by the Court below in support of deference, *Mourning* v. *Family Publications Service, Inc.*, 411 U.S. 356 (1973), and *N. C. Freed Co., Inc.* v. *Board of Governors of the Federal Reserve System*, 473 F.2d 1210 (2d Cir.), *cert. denied*, 414 U.S. 827 (1973), are inapposite. Those cases involved the interpretation of technical provisions of the Act and, therefore, were well within the agency's expertise. *Mourning* involved the validity of the Board's "Four Installment Rule" interpretation of Regulation Z (a disclosure regulation), while *Freed* involved the Board's definition of "security interest."

2. *Where Congress Has Clearly Spoken And Limited The Court's Jurisdiction, The Court Cannot Substitute Its Judgment For That Of Congress And Extend Its Own Jurisdiction.*

The District Court in *Wolf* added as a reason for its decision the belief that finding federal jurisdiction "is not

inconsistent with the Act's paramount objective of ensuring meaningful disclosure of credit terms to the consumer." (App. p. 162a). The Court's rationale is extraordinary in that it supports an extension of federal jurisdiction which not only is contrary to the plain meaning of the statute and its legislative history, but contravenes the rule that federal courts are courts of limited jurisdiction and should be mindful to stay within Congressionally defined limits. 1 Moore's Federal Practice ¶0.60[4] at p. 610 (2d ed. 1974); 2 A Moore's Federal Practice ¶8.07[2]n.2; *Stonybrook Tenants Ass'n, Inc.* v. *Alpert*, 194 F. Supp. 552, 555 n.5 (D. Conn. 1961) ("Access to the federal courts is a matter of right, not of grace . . . . [T]he scope of federal jurisdiction must be determined . . . by Congressional action, not by judicial fiat.")

It is axiomatic that the federal jurisdiction over civil causes of action arising under federal statutes is restricted to the limits set forth by Congress in the statutes. *See generally, Hart, The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362 (1953). *See also, Sheldon* v. *Sill*, 49 U.S. [8 How.] 441, 448-449 (1850); *Kline* v. *Burke Construction Co.*, 260 U.S. 226, 234 (1922); *Lockerty* v. *Phillips*, 319 U.S. 182, 187-188 (1943); *Palmore* v. *United States*, 411 U.S. 389, 396 (1973) (decided on the same day as *Mourning, supra.*) ("Jurisdictional statutes are to be construed 'with precision and with fidelity to the terms by which Congress expressed its wishes . . .'")

Because federal courts are courts of limited jurisdiction, they should be hesitant to expand their authority where to do so intrudes upon state court power and suggests a lack of regard for the rightful independence of state governments. *Cf. Snader* v. *Harris*, 394 U.S. 332, 340-342 (1968), holding that if there is a need to expand the federal diversity jurisdiction it is up to Congress, not the Courts, to do so: "'The policy of the statute calls for strict construction. . . . Due regard for the rightful independence of

state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined.'" 394 U.S. 332, 340. *See generally*, Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORNELL L.Q. 499, 517 (1928).

Federal courts, absent an affirmative grant of jurisdiction from Congress, do not have jurisdiction over state law claims, *Miller's Executors* v. *Swann*, 150 U.S. 132, 136-137 (1893), *American Well Works Co.* v. *Layne*, 241 U.S. 257, 260 (1916) (Holmes, J.), or even federal law claims, *Shoshone Mining Co.* v. *Rutter*, 177 U.S. 505 (1900). *See generally*, C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS §1 (1970); F. Frankfurter, 13 CORNELL L.Q. at 517.

Whether it would have been wiser for Congress to provide that state law should be incorporated into federal law and federal courts should have concurrent jurisdiction with state courts over violation of the "state-federal law" is not a relevant inquiry. For Congress did not establish such an "imperfect federalism" (as the court below terms it); rather it fashioned a "perfect federalism" whereby state law gradually displaces federal law as states enact acceptable legislation and receive *exemptions* from the requirements of the federal law. 15 U.S.C. § 1633. *Cf. Crane* v. *Cedar Rapids & I.C.R. Co.*, 395 U.S. 164, 167 (1969).

For the foregoing reasons it is clear that 15 U.S.C. § 1640(e) does not provide an independent basis for federal jurisdiction over claims arising under the Connecticut Truth-in-Lending Act. Therefore, the decision below holding that such jurisdiction does exist should be reversed and the case remanded for a determination as to whether any other basis for federal jurisdiction exists with instructions to dismiss the complaint if no such basis is found.

II

THE RECORD BELOW RAISES MATERIAL ISSUES OF FACT WITH RESPECT TO PLAINTIFFS' TRUTH-IN-LENDING CLAIMS

Counts I and II of the Complaint allege violations of the Connecticut Truth-In-Lending Act, C.G.S. § 36-393, *et. seq.*, ("The Act"), and the Regulations promulgated thereunder by the Connecticut Banking Commissioner, Conn. Regs. § 36-395-1, *et seq.*[5]

The Court below entered summary judgment for plaintiffs on the truth-in-lending Counts, after finding defendant "liable for violation of 15 U.S.C. § 1640"[6] in five respects:

> 1) the failure to employ the term "Unpaid Balance", Conn. Reg. §§ 36-395-7(*e*)(5); (12 C.F.R. § 226.8(e)(3)); (Order ¶ 6(a), App. p. 182a);
>
> 2) the failure to disclose clearly, conspicuously and meaningfully the "Finance Charge", Conn. Reg. §§ 36-395-5(a); (12 C.F.R. §§ 226.6(a)); (Order ¶ 6(b), App. pp. 182a-183a);
>
> 3) the failure to describe each amount included in the finance charge, Conn. Reg. § 36-395-7(*e*)(8)(A); (12 C.F.R. § 226.8(*e*)(8)(i)); (Order ¶ 6(*e*) App. p. 183a);
>
> 4) the failure to disclose insurance premiums as an element of the finance charge, Conn. Reg. §§ 36-395-3a)(5), 36-395-7(e)(8)(A); (12 C.F.R. § 226.4 (a)(5), 226.8(*e*)(8)(i)); Order ¶ 6(d), App. p. 183a); and
>
> 5) the failure to disclose the meaning and effect of the security interest clause, Conn. Reg. § 36-395-7(b)(5); (12 C.F.R. § 226.8(b)(5)); (Order ¶ 6)(e), App. p. 183a).

5. The Connecticut statute is "substantially similar" to the Federal Act and the Connecticut Regulations "substantially similar" to Regulation Z. For the convenience of the Court, each reference to a section of Connecticut law is followed by a citation to the "substantially similar" Federal law. Since the State and Federal law are substantially similar, the cases arising under and the interpretations of the federal law by the F.R.B. are helpful in interpreting the Connecticut law. The use of these federal authorities is expressly authorized by § 36-395-11 of the Connecticut Regulations.

6. See footnote 4, supra, p. 4.

The Court's opinion and order are printed in the Appendix at pages 159a and 181a, respectively.

A. The Record Before The District Court Raises A Material Question Of Fact As To The Availability To Defendant Of The "unintentional violation" Defense.

This decision below raises the question of whether a creditor who undertakes extensive efforts to comply with the requirements of the Act and who relies upon Federal Reserve Board advice is subject to the same civil penalty as a less diligent creditor who fails to take any action to conform his disclosures to the Act's requirements. The decision of Magistrate Latimer, holding that the "unintentional violation" defense only protects creditors from liability for clerical errors, results in equal exposure for both the careful and the careless.

The affidavit of Robert J. Kelly, defendant's General Counsel, in opposition to the motion for summary judgment, (Kelly Aff't ¶20-27 App. pp. 106a-109a) details the attempts undertaken by defendant to comply with the complex provisions of the Act. Immediately after the passage of the Federal legislation in 1968, "a full year before it became effective," Mr. Kelly began preparation of the necessary disclosure statements. (Kelly Aff't ¶22, App. pp. 107a-108a). At the invitation of the Federal Reserve Board, the agency which Congress authorized to interpret and apply the Act, Kelly met with an F.R.B. staff member, who suggested a few minor changes in the draft forms submitted to the F.R.B. These changes were made, thus bringing the form into line with the Board's then-existing interpretation of the Act and Regulations. (Kelly Aff't ¶22, App. p. 107a). At the time of those meetings, defendant's disclosure statement used the term "Unpaid Balance", rather than "Amount Financed."

Subsequently, in June 1969, the Federal Reserve Board issued a handbook entitled "What You Ought to Know

About Truth-in-Lending." This pamphlet became the basic tool relied upon by the entire credit industry for the drafting of forms. (Kelly Aff't ¶23, App. p. 108a). Exhibit C of the pamphlet (Kelly Aff't Exhibit 3, App. p. 111a) was a form designed by the F.R.B. to provide the disclosures required to comply with the portion of Regulation Z relating to credit transactions other than open credit. The form was accompanied by the following solicitation:

> This form, when properly completed, will show how a creditor may comply with the disclosure requirements of the provisions of paragraphs (b) and (c) of §226.8 of Regulation Z for the type of credit extended in this example.

Having been advised by the F.R.B. that coupon book disclosures should be made in accordance with §226.8 of Regulation Z, (Kelly, Aff't Ex. 5, App. p. 111a) defendant followed the form and substituted the term "Amount Financed" for "Unpaid Balance". As discussed below, the use of the term "Amount Financed" is one of the violations found by the District Court.

The form disclosures were also reviewed by the Federal Trade Commission, which recommended further changes which the defendant incorporated in May, 1970 (Kelly Aff't ¶25, App. p. 109a). In March 1972, the F.T.C. again reviewed the instalment contracts employed by defendant for the sale of coupon books; no further changes were suggested by the F.T.C. (Kelly Aff't ¶26, App. p. 109a).

The section of the Act setting forth the "unintentional violation" defense states:

> A creditor may not be held liable in any action brought under this section for a violation of this chapter and said sections if the creditor shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.
> C.G.S. §36-407(c); (15 U.S.C. §1640(c))

The District Court and plaintiffs would rewrite this section to state that "a creditor may not be held liable . . . if [he] shows that a violation arose out of a clerical error, was not intentional and resulted from a bona fide error. . . ." However, such a reading is not required by the legislative history of the Act and would unduly punish conscientious creditors.

Three District Courts and one State Supreme Court have held that the Federal equivalent of §36-407(e) provides a refuge for creditors who make a bona fide attempt to conform their disclosure statements, but fail to do so. *Welmaker* v. *W. T. Grant Co.*, 365 F. Supp. 531 (N. D. Ga. 1972); *Kenney* v. *Landis Financial Group, Inc.*,—F.Supp. —(N. D. Iowa 1972) [1969-1973 Transfer Binder] CCH Consumer Credit Guide ¶99,100; *Richardson* v. *Time Premium Co.*, F. Supp. (S. D. Fla. 1971) [1969-1973 Transfer Binder] CCH Consumer Credit Guide ¶99,272; *Thrift Funds of Baton Rouge, Inc.*, v. *Jones*, 261 La. 451, 274 So. 2d 150, *cert. denied*, 414 U.S. 820 (1973). *Welmaker* is on all fours with this case, since it involved the same forms as those at issue here. In *Welmaker*, the Court, after an evidentiary hearing, found that defendant's form violated the disclosure requirements of the Federal Truth-in-Lending Act, but held that defendant was excused from civil liability, except as to one violation, by its efforts to assure compliance with the Act.[7] After reviewing the evidence presented, the Court stated:

7. The non-excused violation was distinguished by the Court from those as to which protection was granted on the ground that defendant's ignorance of the insurance rebate provisions of a Georgia statute was "unreasonable and hence, [sic] not in good faith." 365 F. Supp. 531, 544-45. The reasonableness of the failure to comply with that statute was determined only after a hearing on the merits of the *bona fides* of defendant's attempts to comply with the Act. Therefore, although the insurance rebate issue also is present in this case, *Welmaker* does not stand for the proposition that the "unintentional violation" defense is not available as to the insurance rebate issue here, since no evidentiary hearing has been held. See pp. 33 to 36 *infra*.

> It is difficult to imagine any more efforts to comply than those shown here. Prior approval of all forms and indeed duplication of the sample form recommended by the supervising governmental agency is the optimum any party can do in the exercise of good faith. Indeed if the good faith defense envisioned by the Congress is to have any meaning whatsoever, these efforts must suffice. 365 F. Supp. 531, 544.

Richardson v. Time Premium Co., —F. Supp.— (S. D. Fla. 1971) [1969-1973 Transfer Binder] CCH Consumer Credit Guide ¶99,272 also relates directly to the availability of the "unintentional violation" defense to a creditor who mislabels one of the items on the disclosure statement. In *Richardson*, the creditor used the terms "total balance due" and "amount to be financed", instead of the required terminology of "total of payments" and "amount financed", respectively. Although the Court found that these errors constituted violations of the Act, it held that the "unintentional violation" defense prohibited the imposition of civil liability.

> In the case at bar the defendants' failure to comply with the regulations is a de minimus violation which is clearly contemplated by 15 U.S.C. 1640. The agreement on its face reflects the use of a procedure to insure proper disclosure.
> [1969-1973 Transfer Binder] CCH Consumer Credit Guide at p. 89, 239.

The District Court in this case has rejected *Welmaker*, *Richardson* and *Kinney* and has chosen to follow *Ratner v. Chemical Bank New York Trust Co.*, 329 F. Supp. 270 (S.D.N.Y. 1971), which held that only clerical errors are excused by the "unintentional violation" defense. Therefore, the Court held that the factual issues raised by defendant, which did not involve clerical errors, were immaterial.[8]

8. Magistrate Latimer also held that the "unintentional violation" defense is irrelevant where only injunctive relief is granted. While the language of G.G.S. § 36-407(c) (15 U.S.C. § 1640(c) refers

Ratner and its progeny, which generally do not analyze the problem independently, but rely upon Judge Frankel in *Ratner*, are incorrectly decided and should not be followed. First, the legislative history of the Federal Act does not show an intention to so limit the defense. The portions of the history referred to by Judge Frankel in *Ratner*, with one minor exception, Hearings on S. 5 Before the Subcomm. on Financial Institutions of the Senate Comm. on Banking and Currency, 90th Cong., 1st Sess. ("Hearings"), p. 698, do not express a fear by creditors that clerical errors might create civil liability. Rather the cited language either explains the method by which computations are made, Hearings, pp. 64ff; supports the legislation, Hearings, pp. 226, 529, 584; advocates the use of dollar, rather than percentage, disclosure, Hearings, p. 374; or, at most, expresses displeasure at the inconvenience imposed by disclosure requirements, Hearings, pp. 426-27. Second, Judge Frankel misunderstood the nature of the argument made by Chemical Bank in *Ratner*. Chemical Bank did not, as Judge Frankel apparently thought (*See, e.g.*, 329 F. Supp. at 281-82 n.17), argue that the plaintiff must prove a "knowing" violation. Rather, it admitted, as W. T. Grant Co. does in this case, that the burden is on the defendant to prove not only its *bona fides* in attempting to comply, but that the efforts which it undertook were "reasonably adapted" to assure its compliance. "Defendant's Answering Memorandum", pp. 48-52, *Ratner* v. *Chemical Bank New York Trust Company* (S.D.N.Y., February 25, 1971) (Dekt. No. 69 Civ. 4195). Thus, the elimination of the word "knowing" from the House version of the Act is not relevant, as Judge Frankel believed it to be. Finally, Judge Frankel

---

only to liability for damages, the defense must also extend to equitable relief, at least where damages are sought in the same action, since a finding of liability for a violation will generally trigger the damage remedy. Therefore, if it is to provide any protection to creditors, the "unintentional violation" defense must hinge on whether bona fide efforts were undertaken to avoid the error, not on the remedy sought.

interpreted the statutory phrase "violations were not intentional" as meaning that the act which produced the violation must be unintentional. The better reading of the statute would have it mean that the defendant did not intend to violate the Act. To adopt Judge Frankel's reading of the section would effectively eliminate it from the Act, since even the placing of wrong numbers in the disclosure statement—a classic "clerical error"—is intentional in that the person completing the form generally intends to write the particular numbers in the spaces, but errs in determining what number to write, *cf. Wilmaker* v. *W. T. Grant Co.*, 365 F. Supp. 531, 544 (N.D. Ga. 1972).

The uncontradicted Kelly affidavit establishes two areas in which defendant's activities in the drafting of its forms raise questions of fact as to whether it made reasonable efforts to assure that errors would not occur. First, defendant went beyond the normal corporate procedure of having proposed forms reviewed by its legal staff or outside counsel to determine the legality thereof. In addition, defendant went directly to the agency given the responsibility for interpreting the Federal Act, 15 U.S.C. §1604,[9] and sought its approval of specific forms. *Compare, Buford* v. *American Finance Co.*, 333 F. Supp. 1243 (N.D. Ga. 1971) (defendant attempted to comply without seeking legal advice). Second, the defendant complied with all the recommendations made by the Federal Reserve Board. In light of the great reliance placed by the courts on F.R.B. interpretations, see, *Philbeck* v. *Timmers Chevrolet, Inc.*, 499 F.2d 971 (5th Cir. 1974); *Bone* v. *Hibernia Bank*, 493 F.2d 135 (9th Cir. 1974); *Taylor* v. *R. H. Macy & Co., Inc.*, 481 F.2d 178 (9th Cir.) *cert. denied*, 414 U.S. 1068 (1973); *Evans* v. *Household Finance Corp.*, —F. Supp.— (S.D. Iowa, 1973); [1969-1973 Transfer Binder] CCH Consumer Credit Guide ¶99,007, defendant submits that such reliance

9. The Connecticut exemption had not been granted at the time that the form was reviewed and put into use to comply with Federal law.

by a creditor is justified. It is in regard to a creditor's reliance upon F.R.B. advice that the egregious result of the District Court's holding becomes most apparent. Had it not attempted to comply with the F.R.B. sample form, defendant would not have violated Regulation Z by using the term "Amount Financed", instead of "Unpaid Balance", since prior to the publication of "What You Ought to Know About Truth-in-Lending", its form was in compliance with the applicable section of the Federal Regulations.

In summary, the District Court improperly limited the scope of the "unintentional violation" defense; a proper interpretation of that defense protects errors in the drafting of the form, as well as in its completion. Therefore, the activities enumerated in the Kelly affidavit are relevant to defendant's *bona fides* and the reasonableness of the procedures it employed during the drafting process. Since all defendant's factual allegations must be taken as true for purposes of plaintiffs' motion for summary judgment, *Kletschka* v. *Driver*, 411 F.2d 436 (2nd Cir. 1969), and those allegations, if proven, would constitute a complete bar to Counts I and II of plaintiffs' action, *cf.*, *Welmaker* v. *W. T. Grant Co.*, 365 F. Supp. 531 (N.D. Ga. 1972), summary judgment should have been denied. *Keehn* v. *Brady Transfer & Storage Co.*, 159 F.2d 383 (7th Cir. 1947).

Thus, even if this Court should agree with the District Court that defendant's form does not comply with the requirements of the Act, the decision below should be reversed and the case remanded for a hearing on the issue of whether the errors were unintentional and whether defendant maintained reasonable procedures to avoid such errors.

B. The District Court Erred In Granting Summary Judgment On Plaintiffs' Claim That The "Finance Charge" Is Not Disclosed In A Meaningful Manner.

The District Court held that, on so-called "add-on" retail installment contracts, defendant failed to disclose the finance charge in the clear, conspicuous and meaningful

fashion required by Conn. Reg. § 36-395-5(a); (12 C.F.R. § 226.6(a). (Order ¶ 6(a), App. p. 182a). This decision is in error, both because there exists a genuine issue as to a fact material to the resolution thereof and because, assuming the facts are as found by the District Court, defendant was entitled to judgment thereon as a matter of law.

To understand this claim, it is necessary to distinguish between the two types of contracts signed by customers for the purchase of coupon books.. One group of customers does not have any retail instalment contracts outstanding at the time they enter into a retail instalment contract for the purchase of coupon books. To such customers, defendant issues a contract, called a "new and reopened" contract, disclosing the cash price of the coupons and a finance charge equal to the amount of the time-price differential, plus any additional charges, which are disclosed as such. (A copy of the retail instalment contract signed by such customers was submitted as Exhibit S of the Stipulation to Submission of Documents, App. p. 155a). A second group of customers enters into a new retail instalment contract before the final instalment is due under an outstanding prior contract. As to these customers, a new contract, called an "add-on" contract, is issued. (An example of such a form was submitted as Exhibit 15 of the Stipulation to Submission of Documents).[10] Such "add-on" contracts incorporate in the "Amount Financed" (1) the balance due on the outstanding contract, minus a rebate of the unearned finance charge on that balance, (2) the cash price of the new coupons and (3) any additional charges, which are disclosed as such. The finance charge is then computed on the total of these items.

It is on these latter contracts that the District Court held that the "Finance Charge" was inadequately disclosed.

10. "New and reopened" (Nos. 5-7, 9, 10) and "add-on" (Nos. 11-14) retail installment contracts from earlier periods were also submitted as a part of the Stipulation to Submission of Documents (App. p. 155a). Those contracts show changes made in the forms from 1960 to 1970, but are irrelevant to this issue.

Significantly, the Court below did not dispute that the most important item, the cost of credit, is revealed on the "add-on" transaction, (App. p. 172a); it found liability based only upon the format of that disclosure.

1. *The Meaningfulness, Conspicuousness And Clarity Of The Disclosure Presents A Genuine Issue Of Fact.*

The propriety of disclosures as "meaningful, clear and conspicuous" presents a classic question of fact, which should not be resolved by summary judgment. As stated by the District Court for the Northern District of Illinois in *Peritz* v. *Liberty Loan Corp.*, —F. Supp.— (N.D. Ill. 1973) [1969-1973 Transfer Binder] CCH Consumer Credit Guide ¶ 98,969 *appeal docketed*, No. 74-1667, 7th Cir. August 20, 1974:

> The remaining question is whether the notices concerning insurance are 'clear and conspicuous'. This is not entirely a question of law as the parties seem to assume. Although we are inclined to agree with the defendant's contention that its form in this respect complies with the legal requirements, this may be the reaction of a lawyer or judge and not of a reasonable or ordinary borrower. We believe the statute was enacted for the protection of the latter, not the former, group. The Complaint therefor raises not only a question of law but also a question of fact. [1969-1973 Transfer Binder] CCH Consumer Credit Guide at p. 88, 712.

The reasoning in *Peritz* is fully supported by the legislative history of the Act. Truth-in-Lending legislation was enacted to permit consumers to compare the "bottom line" in competing credit transactions—the amount which would be paid in finance costs under various methods of financing. 15 U.S.C. § 1601. With this aim in mind, the clarity of a disclosure must be judged as a factual matter in terms of its impact on the consumer, not as a legal conclusion. Therefore, the District Court erred in granting summary judg-

ment, since "no genuine issues of fact may be resolved on a motion for summary judgment." *Schum* v. *South Buffalo Railway Co.*, 496 F.2d 328, 331 n.4 (2d Cir. 1974). Significantly, in *Welmaker* v. *W. T. Grant Co.*, 365 F. Supp. 531 (N.D. Ga. 1972), upon which the District Court relied, the clarity issue was decided only after an evidentiary hearing, not on a motion for summary judgment.

The decision below should be reversed as to paragraph 6(b) of the Order (App. p. 182a-183a) and remanded for a hearing.

2. *Viewed As A Matter Of Law, The Disclosure Of The "Finance Charge" Is "meaningful, conspicuous, and clear."*

Even if this Court holds that the meaningfulness, clarity and conspicuousness of disclosure is a legal, rather than a factual, issue, it should still reverse the District Court on this question, since the disclosures are sufficiently clear to satisfy the requirements of Conn. Reg. §36-395-5(a); (12 C.F.R. §226.6(a)). The purpose of the Act and the Regulations promulgated thereunder is set forth in the Congressional findings in the Federal Act.

> The informed use of credit results from an awareness of the cost thereof by consumers. It is the purpose of the subchapter to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit.
> 15 U.S.C. §1601.

See also, Mourning v. *Family Publications Services, Inc.* 411 U. S. 356 (1973). Judged against this standard, the "Finance Charge" disclosure is sufficiently conspicuous to comply with the Regulation, since "Finance Charge" is the only terminology in the right-hand column which is in boldfaced type. Thus, this "cost of credit" term is more likely to attract the consumer's eye than the accompanying disclosures. Furthermore, the "Finance Charge" is presented

in a "meaningful sequence", since, as required by the F.R.B., the mathematical calculations are presented in the order in which they must be performed. F.R.B. Letter No. 780, April 10, 1974, 4 CCH Consumer Credit Guide ¶31,102. The applicable portion of the disclosure statement reads as follows:

7. Amount financed (the sum of lines B, 5, 6(a) and 6(b)).

8(a) *Finance Charge* $

(b) Less rebate $ equals

9. Deferred payment price (the sum of lines B, 1, 4, 6(a), 6(b) and 8(a)).

10. Net add-on (the sum of lines 5, 6(a), 6(b) and 8).

11. Total payments (the sum of lines 7 and 8(a)).

The "Finance Charge" thus immediately follows the designation of the "Amount Financed", on which it is computed, and immediately precedes the "Deferred Payment Price" in which it is included. Furthermore, the required Truth-in-Lending disclosures of "Deferred Payment Price" and "Total Payments" relate back to the "Finance Charge" by reference to the line number on which the latter figure appears, thus facilitating even further the debtor's recomputation of the "Finance Charge". The additional information provided on lines 8(b) and 10, while not required by the Act or Regulations, further benefits the debtor by permitting him to differentiate between the portion of the contract which arises from the prior outstanding balance and the portion which arises from new purchases. Provision of such additional information is not a violation of the Act, because the careful line-numbering and typeface schemes adopted by defendant keep the required "Finance Charge" disclosure readily identifiable, F.R.B. Letter No. 780, April 10, 1974, 4 CCH Consumer Credit Guide ¶31,102; Conn. Reg. §36-395-5(b); (12 C.F.R. §226.6(c)).

In summary, this Court should either reverse the District Court as to paragraph 6(*b*) of that Court's Order and remand for an evidentiary hearing on the question of the clarity of the "Finance Charge" or reverse the District Court and find for defendant as a matter of law on that issue.

C. The "Finance Charge" Does Not Have To Be Further Identified Where It Contains Only One Charge For Credit.

The Court below held that defendant violated Conn. Reg. §36-395-7(e) (8) (A); (12 C.F.R. §226.8(e) (8) (i)) by not including "an itemized breakdown of finance charge components," (App. p. 172a) as a part of the disclosure statement. That section provides:

> In the case of a credit sale . . . the following items *as applicable*, shall be disclosed:
>
> * * *
>
> The total amount of the finance charge with a description of each amount included, using the term "finance charge. . . ."
> (Emphasis Added).

"Applicable" provisions are "those necessary to rendering adequate consumer information and incident to a ready comparison of credit terms", *Kenney* v. *Landis Financial Group, Inc.*, F. Supp. (N. D. Iowa 1972) [1969-1973 Transfer Binder] CCH Consumer Credit Guide ¶99,100.

The evidence presented by defendant creates a question of fact as to whether the only element in the "Finance Charge" was an add-on time-price differential (Stipulation to Submission of Documents, Exhibit 14, App. p. 155a), or whether the premiums for credit life and credit accident and health insurance must also be included in the "Finance Charge", Conn. Reg. §36-395-3(a) (5); (12 C.F.R. §226.4(a) (5)). If a hearing on the term of the insurance, see Sec. D, *infra*, establishes that the premium is not an element of the

"Finance Charge", the requirement of "description" is not applicable and the use of the term "Finance Charge" is sufficient identification.

The F.R.B., which drafted the federal regulation, has interpreted it to exclude itemization where, as here, only an add-on charge for credit is included in the "Finance Charge". In a staff letter, the Board's adviser stated:

> It would be proper to simply disclose the dollar figure labeled as the 'finance charge'. The requirement of disclosure of 'each amount included' is applicable only where the total amount of the finance charge includes more than one component. As you indicate, it would be preferable for the creditor not to obscure the clear impact of the disclosure of the "finance charge" by adding additional verbiage with regard to the fact that it is an "add-on". Such an addition could, in fact, violate §226.6(c) which prohibits adding information which is 'stated, utilized, or placed so as to mislead or confuse the customer or contradict, obscure, or detract attention from the information required by this Part to be disclosed." Letter No. 682, April 25, 1973, [April 1969-April 1974 Transfer Binder Truth-in-Lending Special Releases—Correspondence] CCH Consumer Credit Guide ¶30,972.

The F.R.B. has specifically ruled that such public position letters may be construed as the opinion of the F.R.B. on the matters discussed therein until the Board takes affirmative action to overrule the Staff Attorney writing the Letter. Letter No. 444, March 1, 1971. [April 1969-April 1974 Transfer Binder Truth-in-Lending Special Releases—Correspondence] CCH Consumer Credit Guide ¶30,640. The interpretation expressed in Letter No. 682 gains increased credibility, since the sample form in the Handbook "What You Ought to Know About Truth-in-Lending" also refers only to a "finance charge", without itemization (Kelly Aff't. Exhibit 3, App. p. 111a).

The Board's interpretation of the Regulations which it drafted should be given significant consideration by a Court

which also is called upon to interpret an ambiguous provision.

> [T]he construction which the Federal Reserve Board gives its own Regulation Z in its Interpretations and staff opinions is especially entitled to great deference 'because of the important interpretive and enforcement powers granted this agency by Congress' in this highly technical field.

Philbeck v. *Timmers Chevrolet, Inc.*, 499 F. 2d 971, 977 (5th Cir. 1974) (relying upon an Interpretation and an Opinion Letter); *accord, Bone* v. *Hibernia Bank*, 493 F. 2d 135 (9th Cir. 1974) (relying upon an Interpretation, an Opinion Letter, and the Handbook); *Taylor* v. *R. H. Macy & Co., Inc.*, 481 F. 2d 178 (9th Cir.), *cert. denied*, 414 U.S. 1068 (1973) (replying upon the Handbook); *Evans* v. *Household Finance Corp.*, —F. Supp— (S.D. Iowa 1973) [1969-1973 Transfer Binder] CCH Consumer Credit Guide ¶99,007 (relying upon the Handbook).[11] Based upon the policy of the Act, the F.R.B. interpretation of §226.8(c)(8)(i) that the itemization is not "applicable" where there is only one item is sound. As stated by Undersecretary of the Treasury, Joseph Barr, before the House Committee, the legislation was aimed at providing a standard and simple set of terms to enable consumers to compare different sources of credit.

> The consumer now finds it impossible to select from all the credit sources available that one which is cheapest or best for his needs. Because of the wide array of lending practices he is unable to make a rational choice among the alternatives. There is abundant evidence on this point. This is an area in our economy that has grown so fast it has created its own language. Much of that language is beyond comprehension for most consumers. Even those sophisticated in finance find difficulty in distinguish-

11. *Ratner* v. *Chemical Bank New York Trust Co., supra*, does not conflict with these cases. In *Ratner*, Judge Frankel merely disagreed with the reasoning of one staff opinion letter; he did indicate that such opinion letters generally should not be followed.

> ing "add-on", "discounts", "precompute", "rule of 78's", "service charges", "finance charges", "interest", "term price differentials", "sales prices versus cash prices", and so forth. The variety of rate quotations is beyond belief and sometimes ridiculous. Even a financial expert, who knows the ins and outs of credit, can find the correct solution difficult in the absence of uniform standards for disclosure.
>
> Hearings on H.R. 11601 before Subcomm. on Consumer Affairs of House Comm. on Banking and Currency, 90th Cong., 1st Sess. 1967, p. 76.

The disclosure requirement imposed by the Court below contradicts that policy by requiring the labeling of the "finance charge" as "interest", "time price differential" or by some other name, thus leading the consumer to believe that there is some difference between the identical finance charges imposed by different sources of credit. For example, a retail store selling a refrigerator would be required to label its "finance charge" as a "time price differential", while a bank, from which the customer could borrow sufficient funds at a different annual percentage rate to buy the refrigerator for cash, would be required to label the "finance charge" as "interest". Thus, the customer might well be led to believe there was some difference, beside the cost of the credit, between the "finance charges" assessed by the two institutions.

In summary, the requirement of Conn. Reg. § 36-395-7 (c)(8)(A); (12 C.F.R. § 226.8(c)(8)(i)) that the finance charge be itemized is not applicable where only a single-item finance charge is imposed. Therefore, the District Court erred and paragraph 6(c) of the Order should be reversed and remanded for an evidentiary hearing on the insurance issue discussed in Section D, *infra*.

D. *A Genuine Issue Exists As To A Material Fact Regarding The Adequacy Of Defendant's Disclosure Of The Premiums For Credit Life And Credit Accident And Health Insurance.*

The District Court held that defendant violated Conn. Reg. §§ 36-395-3(a)(5), 36-395-7(c)(8)(A); (12 C.F.R.

§§ 226.4(a)(5) 226.8(c)(8)(i)), in that it failed to include the premiums charged for credit life and credit accident and health insurance in the "Finance Charge." Defendant concedes that insurance premiums are not included in the "Finance Charge", but contends that because of the treatment given to the terms of such insurance by defendant and the insurance carrier, such inclusion is not necessary. As determination of the term of such insurance raises a question of fact, summary judgment should have been denied.

The Regulation at issue provides that insurance premiums need not be included in the "Finance Charge" when (1) they are voluntary, i.e., not required by the creditor, (2) it is necessary for the debtor to take certain affirmative action to purchase the insurance, and (3) the price of the insurance is properly disclosed.[12] The District Court did not find that insurance is involuntary and, therefore, a part of the "Finance Charge" when purchased as a part of a "new or reopened" retail instalment contract.

When a customer enters into a "add-on" contract, there is a rebate of the unearned "Finance Charge." (Stip. of Facts, ¶ 16; App. p. 118a). However, there is no rebate of insurance premiums (Stip. of Facts, ¶ 75; App. p. 127a). Plaintiffs contend and the Court held that the insurance automatically terminates upon refinancing of the outstanding balance by virtue of the terms of the certificate of insurance. (Stip. to Submission of Documents, Exs. 2 and 3; App. p. 155a). This set of facts would bring

12. Conn. Reg. §36-395-3(a)(5) provides for inclusion in the "finance charge" of

> "charges or premiums for credit life, accident, health or loss of income insurance, written in connection with any credit transaction unless (A) the insurance coverage is not required by the creditor and this fact is clearly and conspicuously disclosed in writing to the customer; and (B) any customer desiring such insurance coverage gives specific dated and separately signed affirmative written indication of such desire after receiving written disclosure to him of the cost of such insurance."

the amount of the unrebated premium within the "Finance Charge", since the unrebated premium would constitute an involuntary purchase of insurance. Defendant, on the other hand, introduced evidence that when the "add-on" contract is signed, insurance on the outstanding balance remains in full force and effect. The affidavit of Robert J. Kelly states "the insurance coverage provided under the credit life, [sic] and credit accident and health policies does not terminate at the time that 'add-on' occurs. The coverage remains in full force and effect," (Kelly Aff't ¶ 29, App. p. 110a). Furthermore, the affidavit of Richard S. Nash, Assistant Vice-President of Continental Assurance Company, which provides the credit life and credit health and accident insurance to defendant, states:

> It is my understanding that when a customer of W. T. Grant Company negotiates an 'add-on' transaction this is not considered in the nature of a refinancing or renewal which would require termination of the insurance.
>
> (Nash Aff't, App. p. 111a).

Under defendant's set of facts, the voluntariness of the insurance coverage and the adequacy of the disclosures in relation thereto would be judged on the basis of the contract signed by the debtor when he first incurred the outstanding balance, not on the basis of the "add-on" contract.

Welmaker v. *W. T. Grant Co.*, 365 F. Supp. 531 (N.D. Ga. 1972), upon which the District Court relied, supports defendant on this appeal holding that a new disclosure of the insurance premiums is only necessary if the outstanding balance is refinanced, i.e. if plaintiffs' position is accepted. In *Welmaker*, Judge Smith, after an evidentiary hearing, held that when an "add-on" contract was entered into by a debtor, the insurance was refinanced.

> It is the plaintiffs' contention that when the add-on contract is made a refinancing or renewal of the original (i.e. "new") contract is made. Defendant

> however asserts that 'an add-on is no more than an increase in an existing obligation. . . .' [footnote omitted] As will be seen below this distinction is a crucial one. The Court is persuaded that the extension of the time in which the outstanding balance on the new contract must be paid with a charge for that extension over-and-above the charge originally assessed can be deemed nothing other than a refinancing.
>
> 365 F. Supp. 531, 537.

While defendant disagrees with the determination reached in *Welmaker* on the merits, the issue on this appeal is limited to whether a question of fact exists. *Welmaker* demonstrates the existence of such an issue. Therefore, Paragraph 6(d) of the Order below should be reversed and remanded for an evidentiary hearing.

E. A Genuine Question Of Fact Exists As To Whether Defendant Retains And, Therefore, Must Disclose A Security Interest.

The District Court held that defendant violated Conn. Reg. §36-395-7(b)(5); (12 C.F.R. §226.8(b)(5)), in that defendant failed "to disclose clearly the meaning and effect of the security clause", and granted summary judgment for plaintiffs on that issue. This ruling was in error, since there exists a material question of fact.

The provision requiring the description of security interests only applies if the creditor actually retains a security interest. Conn. Reg. §36-395-7(b)(5) provides, in relevant part:

> In any transaction subject to this section, the following items, as applicable, shall be disclosed:
>
> * * * * *
>
> a description or identification of the type of any security interest *held or to be retained or acquired by the creditor* in connection with the extension of credit, and a clear identification of the property to which the security interest relates or, if such prop-

> erty is not identifiable, an explanation of the manner in which the creditor *retains or may acquire* a security interest, in such property which the creditor is unable to identify.
>
> (Emphasis added).

See Scott v. *Liberty Finance Co.*,——F. Supp.-——(D. Neb. 1974) CCH Consumer Credit Guide ¶98,750; F.R.B. Letter of August 8, 1969 [April 1969-April 1974 Transfer Binder Truth-in-Lending Special Releases-Correspondence] CCH Consumer Credit Guide ¶30,125.

In the instant case, as recognized by the District Court,[13] there is evidence that defendant retained no security interest where the retail instalment contract was used for credit purchase of coupon books. (Kelly Aff't ¶8, App. p. 100a).[14] However, the District Court resolved this question of fact by concluding that a security interest was retained. "The printed contract speaks for itself and is in patent violation of the duty to delineate clearly the meaning and effect of any security interest clause." (App. p. 174a). Such resolution of questions of fact on a motion for summary judgment is totally improper. *Schum* v. *South Buffalo Railway Co.*, 496 F.2d 328 (2nd Cir. 1974); *Lemelson* v. *Ideal Toy Corp.*, 408 F.2d 860, 863 (2nd Cir. 1969). The sole function of the Court is to determine whether a dispute exists as to a material question of fact; upon finding such a dispute, summary judgment must be denied. 10 Wright and Miller, Federal Practice and Procedure §2725 at 513-14 (1973).

Since the disclosure requirements of Conn. Reg. §36-395-7(b)(5) are irrelevant if defendant did not retain a security interest, Paragraph 6(e) of the District Court's Order should be reversed and the case remanded for a hearing on that issue of fact.

---

13. "Defendant now disclaims by affidavit any security interest in either the coupons or the merchandise for which the coupons are exchanged. . . ." (App. p. 174a).

14. The reference to a security interest on the face of the contract is present only because the same form is used for other financing plans, under which a security interest is retained.

F. Summary

Questions of fact exist as to both the liability of defendant for the enumerated alleged violations and the availability of the "unintentional violation" defense as a bar to plaintiffs' claim. Therefore, summary judgment under Fed. R.Civ.P. 56(a) was improperly granted. This Court should reverse and remand this case to the District Court for an evidentiary hearing as to whether defendant's conduct in the drafting of its forms entitles it to the protection of the "unintentional violation" defense. Furthermore, as to the alleged violations set forth in paragraph 6 of the District Court's Order, this Court should reverse and remand for hearings on the applicable underlying facts.

III

THE RECORD BELOW RAISES MATERIAL ISSUES OF FACT WITH RESPECT TO PLAINTIFFS' USURY CLAIMS.

Section 37-4 of the Connecticut General Statutes provides:

> No person and no firm or corporation or agent thereof, other than a pawnbroker as provided in Section 21-44, shall, as guarantor or otherwise, directly or indirectly, loan money to any person, and directly or indirectly, charge, demand, accept or make any agreement to receive therefor interest at a rate greater than twelve per cent per annum.

This statute and the cases arising under it make it clear that usury, in addition to an excessive rate of return, consists of three elements:

(1) a loan;

(2) of money;

(3) intent to violate the usury laws.

A. Loan

Section 37-4 by its express terms applies only to loans. One hundred and fifty years of Connecticut case law, applicable in this case under *Erie* v. *Tompkins*, 304 U.S. 64

(1938), hold that the transactions in question are sales not loans and are, therefore, not subject to the usury statute. Sales held not to be subject include:

> 1. Sales of property on credit—the "time-price" doctrine—*Zazzaro* v. *Colonial Acceptance Corp.*, 117 Conn. 251 (1933); *Bridgeport L.A.W. Corp.* v. *Levy*, 110 Conn. 255, 259-261 (1929); see *Manufacturer's Advertising, Inc.* v. *Pancoast*, 4 Conn. Cir. Ct. 668, 670, 238 A.2d 810, 811 (1967);
>
> 2. Sales of negotiable instruments after initial negotiation, *Walcott* v. *Skilton*, 139 Conn. 424 (1952), *Belden* v. *Lamb*, 17 Conn. 441 (1846) *Tuttle & Holt* v. *Clark*, 4 Conn. 153 (1822); and
>
> 3. Sales of credit *Beckwith* v. *Windsor Mfg. Co.*, 14 Conn. 594 (1842), *DeForest* v. *Strong*, 8 Conn. 513 (1831), *Hutchinson* v. *Hosmer*, 2 Conn. 341 (1817); see *Douglas* v. *Boulevard Co.*, 91 Conn. 601 (1917), *Beadle* v. *Manson*, 30 Conn. 175 (1861).

Indeed, the plaintiffs concede in their complaint that the transactions are sales. (Count I, ¶ 6, App. p. 15a). Further, even apart from plaintiffs' concessions, the record indicates that the transactions in question are sales. The property sold is the coupon book, which is a "general intangible" as defined by Section 42a-9-106 of the Connecticut General Statutes. The coupon book is offered for sale by defendant at both a cash price and a time price. The amount in excess of the cash price of the coupon book represents the advance over the cash price, is not interest, and is not intended by the defendant as a device to defeat the usury laws.

> When property is sold on credit at an advance over the cash price, in good faith, and with no intention to defeat the usury laws, the transaction will not be held usurious though the difference between the cash price and the credit price, if considered as interest, would amount to more than the legal rate. *Bridgeport L.A.W. Corporation* v. *Levy*, 110 Conn. 255, 259 Atl. 841.
>
> *Zazzaro* v. *Colonial Acceptance Corp.*, 117 Conn. 251, 254 (1933).

In addition, on the record below, plaintiffs have not sustained their burden of establishing that the transactions are loans. The fact that the installment sales contracts between plaintiffs and defendant employ the terms "finance charge" and "annual percentage rate" does not lead to an inference that the transactions were loans because such terms are required by the Connecticut Truth-in-Lending Act, C.G.S. § 36-393 *et seq.* Indeed, the Act explicitly provides:

> In any action or proceeding in any court involving a consumer credit sale, the disclosure of an annual percentage rate required by this chapter and said sections may not be received as evidence that the sale was a loan or any type of transaction other than a credit sale, and in any consumer credit transaction, the disclosure of an annual percentage rate required by this chapter and said sections shall not in itself indicate that a transaction is usurious or that the rate of charge exceeds a statutory ceiling.
> § 36-398(b).

Similarly, the fact that defendant made no charge for Connecticut sales tax does not lead to an inference that the transactions were loans; the Connecticut sales tax (which applies only to sales of *tangible* personal property, hotel room occupancy and utility service) is not applicable to sales of the coupons, which are intangibles. C.G.S. § 12-407(2). Therefore, the facts on the record do not give rise to inferences that the transactions in question were loans. In addition, while it is clear that this factual issue remains, it should also be noted that Connecticut courts have since early cases submitted to the jury the questions whether a transaction is a usurious loan or a sale. *Beldon* v. *Lamb,* 17 Conn. 441, 452-453 (1846); *Finance Discount Corp* v. *Horwitz,* 138 Conn. 636 (1952).

Furthermore, even if certain inferences were possible from the record, a motion for summary judgment is not the appropriate time to draw such inferences.

> Summary judgment is particularly inappropriate where "the inferences which the parties seek to have

drawn deal with questions of motive, intent and subjective feelings and reactions." *Empire Electronics Co.* v. *United States*, 311 F.2d 175, 180 (2d Cir. 1962); See *Alabama Great So. R.R.* v. *Louisville & Nashville R.R.*, 224 F.2d 1, 5 (5th Cir. 1955); *Subin* v. *Goldsmith*, 224 F.2d 753, 758 (2d Cir. 1955). "A judge may not, on a motion for summary judgment, draw fact inferences. ***Such inferences may be drawn only on a trial." *Bragen* v. *Hudson County News Co.*, 278 F.2d 615, 618 (3d Cir. 1960).

Cross v. *United States*, 336 F.2d 431, 433 (2d Cir. 1964).

As explained in Addendum A, Grants "Coupon Book Installment Plan" and "Special Purchase Installment Plan" operate identically and Grants uses exactly the same retail installment sales contract for both plans. If obtaining a coupon book pursuant to such a contract constitutes a loan, obtaining a refrigerator, television or other "big ticket" item under the same contract would also constitute a loan. This would mean that all "closed-end" financing would for the first time be held subject to the usury laws. Which in turn would mean the contracts running into billions of dollars might be unenforcible. For example, most automobiles are purchased under retail installment sales contracts all but identical to those in issue here and the "annual percentage rates" in these contracts are typically in excess of 12 percent.

For over 150 years, it has been a settled matter under Connecticut law that transactions falling within the exceptions discussed above are exempt from the usury laws. It would particularly be inappropriate for a federal court sitting in this case to overrule such established Connecticut precedent. For reasons of judicial economy, pendent jurisdiction affords litigants another tribunal, but not another body of law.

B. Money

Similarly, the record discloses that there is a factual issue with respect to whether what the plaintiffs received from

the defendant was money. The only thing received from the defendant by the plaintiffs under the retail installment sales contracts in question was a coupon book. Section 37-4 by its terms applies only to the loan of money. Clearly the coupons are not money. Money can be used anywhere and is not replaced if lost, destroyed, or stolen. Coupons, on the other hand, can be used only at Grants' stores or other "member stores" and are replaced if lost, destroyed, or stolen.

In its opinion (App. pp. 175a), the Court cites without discussion or analysis, two cases holding that the Grants coupon plan is usurious. *Johnson* v. *W. T. Grant Co.*, 4 CCH Consumer *Credit Guide*, ¶ 99,084, page 88,905 (Jan. 19, 1973); and *W. T. Grant Co* v. *Walsh*, 241 A.2d 461 (1968). These cases, however, are not in point. In the *Johnson* case, the Minnesota usury statute provides as follows:

> The interest for any legal indebtedness shall be at the rate of $6 upon 100 for a year, unless a different rate is contracted for in writing; and no person shall, directly or indirectly, take or receive in money, goods, or things in action, or in any other way, any greater sum, or any greater value, for the loan or forebearance of money, goods or things in action than $8 upon 100 for one year . . .
>
> M.S.A. 334.01

The New Jersey statute involved in the *Walsh* case provides as follows:

> Except as otherwise provided by law, no person shall, upon contract, take, directly or indirectly, for loan of any money, wares, merchandise, goods and chattels, above the value of six dollars ($6.00) for the forebearance of one hundred dollars ($100.00) for a year.
>
> New Jersey Statutes §311-13

In none of these cases was the usury statute limited to "money". Clearly, therefore, these cases are not authority for the proposition that Grants coupon plan is usurious

under the Connecticut statute which by its express terms is limited to money.

C. Intent

Similarly, the record below discloses that there is a genuine factual issue as to whether the defendant had the unlawful intent necessary to constitute usury. Intent is one of the elements of usury. *Zazzaro* v. *Colonial Acceptance Corp.*, 117 Conn. 251, 254 (1933). Under Connecticut law, usurious intent is always a question of fact for the trier. As the Connecticut Supreme Court said in *Community Credit Union* v. *Connors*, 141 Conn. 301 (1954):

> The act of taking an apparently usurious note is always susceptible of an explanation which will strip it of the intent required to render it offensive to the law. *Atlas Realty Corporation* v. *House*, 123 Conn. 94, 99, 192 A. 564; *DeVito* v. *Freberg*, 94 Conn. 145, 148, 108 A. 547. This presents a question of fact for the trier. *Mutual Protective Corporation* v. *Palatnick*, 118 Conn. 1, 4, 169 A. 917; *Douglass* v. *Boulevard Co.*, 91 Conn. 601, 604, 100 A. 1067; *Beckwith* v. *Windsor Mfg. Co.*, 14 Conn. 594, 605.
>
> 141 Conn. 301, 307.

This rule was followed *In re Feldman*, 250 F.Supp. 218 (D.Conn. 1966). See *Wesley* v. *DeFonce Contracting Corp.*, 153 Conn. 400 (1966). The degree to which the question of usurious intent is left to the jury was stated in *Douglass* v. *Boulevard Co.*, 91 Conn. 601 (1917):

> All statutes against usury, as interpreted by the courts, have been held to prohibit contracts made with an intent to evade the statute, whether or not such statutes have provisions the same as the one now in force in this State. Whether such an intention is present in any contract is always a question of fact for the jury.
>
> 91 Conn. 601, 604.

The fact that the rules concerning usury have been in effect for over 150 years has led to enormous reliance by

commercial enterprises such as the defendant. The court, we submit, should not allow such reliance to be twisted, as a matter of law on a motion for summary judgment, into evidence of usurious intent. "To hold otherwise", as the Connecticut Supreme Court said in *Walcott* v. *Skilton*, 139 Conn. 424, 426 (1935), "would invalidate contracts running into millions of dollars."

The defendant has submitted affidavits that its intent was not to make a loan and not to defeat the usury laws, but rather to sell coupon books at either a cash price or a time price. Under these facts the defendant does not have the unlawful intent necessary to constitute usury. The plaintiffs assert the opposite conclusion; a trial is necessary to resolve the issue.

> [S]*ound judicial administration strongly* suggests that a court should not attempt to reconstruct the intent of the parties in a complicated factual situation before they have had an opportunity to present evidence on that issue before the fact-trier.
>
> *Union Insurance Soc. of Canton, Ltd.* v. *William Gluckin & Co.*, 353 F.2d 946, 952 (2d Cir. 1965)

For the foregoing reasons, the Court erred in granting plaintiffs' motion for partial summary judgment on Counts IX and X because the record raises genuine issues as to material facts.

IV

THE RECORD BELOW RAISES MATERIAL ISSUES OF FACT WITH RESPECT TO PLAINTIFFS' SMALL LOAN ACT CLAIMS

The Court also held that the defendant's coupon plan violated § 36-243 of the Connecticut General Statutes which provides:

> *Charge of greater than legal interest.* No person, partnership, association or corporation, except as authorized by the provisions of this chapter, shall, directly or indirectly, charge, contract for or receive any interest, charge or consideration greater than

> twelve per cent per annum upon the loan, use or forbearance of money or credit of the amount or value of one thousand eight hundred dollars or less. The provisions of this section shall apply to any person, who, as security for any such loan, use or forbearance of money on credit, makes a pretended purchase of property from any person and permits the owner or pledgor to retain the possession thereof, or who, by any device or pretense of charging for his services or otherwise, seeks to obtain a greater compensation than twelve per cent per annum. No loan for which a greater rate of interest or charge than is allowed by the provisions of this chapter has been contracted for or received wherever made, shall be enforced in this state, and any person in anywise participating therein in this state shall be subject to the provisions of this chapter.

As discussed in the preceding section of this brief with respect to usury, the record raises a factual issue as to whether the transactions in question constitute a bona fide sale or a loan. The argument presented there applies with equal force to the small loan act claims.

However, there is an additional reason why the Court erred in granting the plaintiffs' motion for partial summary judgment on the small loan act claims. Section 36-243, cited above, is part of Chapter 647 of the Connecticut General Statutes entitled "SMALL LOANS". That chapter provides for the licensing and regulation of the "Small loan business". Section 36-225, the first section in the chapter, provides:

> *Loan business to be licensed.* No person, partnership, association or corporation *shall engage in the business* of making loans of money or credit in the amount or to the value of one thousand eight hundred dollars or less, and charge, contract for or receive a greater rate of interest, charge or consideration than twelve per cent per annum therefor, except a state bank and trust company, national banking association, savings bank, industrial bank, private banker, credit union, building or savings and loan association or licensed pawnbroker, unless licensed to do so by

> the banking commission as provided in this chapter. (Emphasis added)

The record is absolutely barren of any facts to support a conclusion that the defendant did "engage in the business of making loans of money or credit". Indeed, quite the contrary appears from the record. Grants is engaged in the business of selling a wide variety of merchandise *at retail* and for this purpose operates 1,168 stores in 43 states including 55 stores in the State of Connecticut. In fiscal 1971, Grants had gross sales of $1,374,811,791. (Kelly Affidavit ¶ 4, App. p. 98a)

For these reasons, the Court erred in granting the plaintiffs' motion for partial summary judgment on Count XII of the Complaint.

V

THE COURT ERRED IN GRANTING INJUNCTION RELIEF BECAUSE THE RECORD CONTAINS NO EVIDENCE OF IRREPARABLE HARM OR LACK OF AN ADEQUATE REMEDY AT LAW

Paragraph 9 of the judgment entered on April 25, 1974, provides:

> (9) That the defendant be and is hereby enjoined from collecting any further payments under outstanding coupon contracts made in Connecticut, and from entering hereafter into any coupon contracts in Connecticut on which the annual percentage rate exceeds twelve per cent.

This order is not supported by the record. Under the law of Connecticut:

> when an equitable injunction is the specific relief claimed, it is incumbent upon the party seeking relief to allege [and prove] facts showing irreparable damage and lack of an adequate remedy at law. *Stocker* v. *Waterbury*, 154 Conn. 445, 449 (1967)

Counts IX, X and XII of the complaint contain no allegations of irreparable injury or lack of an adequate remedy

at law and the record is absolutely barren of any evidence of irreparable injury or lack of an adequate remedy at law.

Indeed, even a casual reading of the applicable statutes discloses a perfect remedy at law. Section 37-8 of the Connecticut General Statutes provides:

> No action shall be brought to recover principal or interest, or any part thereof, on any loan prohibited by Sections 37-4, 37-4 and 37-6, or upon any cause arising from the negotiation of such loan.

Section 36-243 of the Connecticut General Statutes provides in relevant part.

> No loan for which a greater rate of interest or charge than is allowed by the provisions of this chapter has been contracted for or received, whereever made, shall be enforced in this state. . . .

Thus, if a purchaser of a coupon book believes that the retail installment sales contract violates either the usury law or the small loan act, he can merely not pay the installments on the contract and if he is sued raise §§37-8 and 36-243 as a defense to the action.

The Court also ignored a fundamental principle of equity jurisprudence in granting the plaintiffs' equitable relief without also requiring them to do equity.

> Wherever the statutes have made usurious loans and obligations absolutely void, if a borrower brings a suit in equity for the purposes of having a usurious bond or other security surrendered up and canceled, [or for other equitable relief] the relief will be granted only upon condition that the plaintiff himself does equity by repaying to his creditor what is justly and in good faith due, that is, the amount actually advanced, with lawful interest unless, indeed, the statute has gone so far as to expressly prohibit the court from imposing such terms as the price of its relief. (bracketed material in original text)
>
> POMEROY'S EQUITY JURISPRUDENCE
> (5th ed. §391)

This basic principle has been recognized in Connecticut since 1785. In the case of *Little* v. *Fowler,* 1 Root 94 (1785) the Supreme Court affirmed a decree in chancery ordering the maker of a note which had been held usurious at law to pay to the payee's estate the principal amount of the note plus legal interest.

For these reasons, the Court's judgment order enjoining the defendant from collecting any further payments on outstanding coupon accounts made in Connecticut should be reversed.

VI

THE COURT ERRED IN HOLDING THAT NOTICE TO THE ABSENT MEMBERS OF THE CLASS WAS NOT REQUIRED.

The Court ordered this action maintained as a class action under Rule 23(b)(2) of the Fed. R. Civ. P. and further held that notice was not required to the absent members of the class citing this Court's decision in *Eisen* v. *Carlisle & Jacquelin,* 479 F.2d 1005 (2nd Cir. 1973) *affirmed,* —U.S.—, 94 S.Ct. 2140, (1974).

It is so that *Eisen* suggests that notice should not be required in cases under Rule 23(b)(2). However it is the defendant's position that the "injunctive relief" granted in this case is equivalent to an award of money damages and therefore that the rule applicable to Rule 23(b)(3) cases must be applied to this case.

The Court granted plaintiffs' request for an injunction enjoining the defendant "from collecting any further payments under outstanding coupon contracts made in the State of Connecticut. . ." However, it denied plaintiffs' request for an injunction compelling the return of monies collected by the defendant on the same outstanding coupon contracts on the ground that:

> . . . plaintiffs are in reality seeking extensive class-wide monetary relief; whether the class refund claim is technically denominated a claim for equitable re-

> lief or for damages, pursuit of that measure of relief should be accompanied by provision of notice as prescribed by *Eisen III* as long as that decision remains the law of this Circuit. (App. p. 169a)

The defendant agrees with the Court's reasoning in denying an injunction to the class compelling the return of monies collected. However, it would seem that the same reasoning applies with equal force to the request for an injunction enjoining collection. It is no less money damages to order someone not to collect $100 than it is to order him to pay back $100. Either way each of the absent class members has $100 at risk.

Since the relief granted to the class is essentially monetary relief, notice to the absent members of the class is required. *Eisen* v. *Carlisle & Jacquelin, supra.* Moreover, as the Court pointed out:

> . . . it is evident that application of the rule to this case would preclude maintenance of the class claims, Cf. *Givens* v. *W. T. Grant Company,* Civil No. 14,296 (D.Conn. 1971), *vacated on other grounds,* 457 F.2d 612 (2d Cir. 1972) (App. pp. 166a-167a)

For these reasons the order of the court certifying the case as a class action for purposes of "injunctive relief" should be reversed and the case dismissed as a class action for these purposes.

CONCLUSION

For the reasons stated in Section I, the decision below holding that jurisdiction exists under 15 U.S.C. §1640(e) should be reversed and the case remanded for a determination as to whether there is any other basis for federal jurisdiction, with instructions to dismiss the Complaint if no such basis is found; in the alternative, for the reasons stated in Sections II, III, IV and V, the judgment of the

District Court should be reversed and further proceedings ordered; and, for the reasons stated in Section VI, the judgment of the District Court certifying a class action for purposes of injunctive relief should be reversed with directions to dismiss the class action allegations of the complaint.

Respectfully Submitted,

WILLIAM J. EGAN
J. MICHAEL EISNER
DAVID A. REIF
Attorneys for Defendant-Appellant

WIGGIN & DANA
205 Church Street
P.O. Box 1832
New Haven, Connecticut

Dated: October 24, 1974

ADDENDUM A
THE COUPON PLAN

The W. T. Grant Company is engaged in the business of selling a wide variety of merchandise at retail and for this purpose operates 1,168 stores in 43 states including 55 stores in the State of Connecticut. In fiscal 1971, Grants had gross sales of $1,374,811,791. (Kelly affidavit ¶ 4).

For many years, Grants, in addition to cash sales, has made sales of merchandise under three time-payment plans. These time-payment plans are designated by Grants as follows:

(1) "Special Purchase Installment Plan" or "big ticket" account;

(2) "Coupon Book Installment Plan";

(3) "30-Day Option Plan" (Kelly affidavit ¶ 5).

Although only the Coupon Book Installment Plan is here in controversy, an understanding of both the "Special Purchase Installment Plan" and the "Coupon Book Installment Plan" will be helpful in considering the arguments being made by both Grants and the plaintiffs.

Under Grants Special Purchase Installment Plan a customer selects one or more articles of merchandise, and agrees in a retail credit agrement to pay for the merchandise in equal monthly installments over a fixed period of time. The fixed periods vary between a minimum and a maximum number of months. Over the years the limits have varied between a minimum of 9 months and a maximum of 37 months. A finance charge, which is called a "time-price differential" is determined and included as part of the selling price in the agreement. The monthly payments vary from $5 to $25 on sales from $35 to $500, respectively. The customer receives an installment payment card, which he mails or presents monthly, to Grants,

together with the monthly payment. Grants records the receipt of the monthly payment on the card for the customer's records. Grants does not bill its customers under the Special Purchase Plan. Grants retains title to the merchandise purchased under this plan until full payment is made. (Kelly affidavit ¶ 7).

Under Grants "Coupon Book Installment Plan", which has been continuously in effect in Connecticut since 1946, a customer who has established a satisfactory credit rating is issued a book of coupons, which the customer uses when acquiring merchandise. Such coupons are issued in books of $10, $15, $20, $25, $35, $50, $100, and $200 which contain coupons of various denominations totaling these amounts. Each coupon book is numbered. At the time the coupon book is issued to the customer, the customer agrees in a retail installment sales contract to make payment for a specified amount of coupons in equal monthly installments over a fixed period of time. Over the years, the periods have varied between a minimum of 4 months and a maximum of 25 months. At the time of issuance of the coupon book to the customer and execution of the retail installment sales contract, the time-price differential is determined and included as part of the selling price in the agreement. This plan provides for monthly payments ranging between $5 and $20 on sales between $10 and $300, respectively. Coupons may be exchanged by the customer for merchandise at any of Grants stores throughout the country, regardless of where such coupons are issued. The customer is provided with an installment payment card, identical to that described above with respect to the Special Purchase Installment Plan, which he mails or presents monthly to Grants, together with the monthly payment. Grants records receipt of the monthly payment on the card for the customer's records. Grants does not bill its customers under the Coupon Book Installment Plan. Under this plan, Grants does not retain a security interest in either

the coupons or the merchandise for which coupons are exchanged. (Kelley affidavit ¶ 8).

For purposes of economy and convenience, Grants uses the same form retail installment sales contract for both the "Special Purchase Installment Plan" and the "Coupon Book Installment Plan". Under both the "Special Purchase Installment Plan" and the "Coupon Book Installment Plan", the customer may prepay the full balance due under the retail installment sales contract, in which event he receives a proportional refund credit of part of the time-price differential, as required by applicable state law. A Customer may return merchandise or unused coupons, in which event the amount due under the retail installment sales contract and the time-price differential will be appropriately reduced. A customer may enter into a new retail installment sales contract before the final installment under a prior agreement is due, in which event the new contract will incorporate the prior balance due and will include a new time-price differential, determined at the time of signing the new agreement, with reference to the new principal amount. This is known as an "add-on" contract. In Connecticut, the finance charge under the "Special Purchase Installment Plan" and the "Coupon Installment Plan" are exactly the same. (Kelly affidavit ¶ 9).

IN THE
UNITED STATES COURT OF APPEALS
For the Second Circuit

Docket No. 74-2131

Mildred Ives, Moira Robertson &
Joyce Chapman, etc.
Plaintiffs-Appellees,
vs
W. T. Grant Company,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT
OF CONNECTICUT

Affidavit of Service by Mail

STATE OF NEW YORK
COUNTY OF New York } ss.:

Robert McElroy , being duly sworn, deposes and says:

I am over the age of twenty-one years and reside at 32 Irving Place , in the Borough of Manhattan , City of New York. On the 29th day of October , 19 74 , at 4:00pm o'clock ,

I served 2 copies of the Brief and 1 copy of the Appendix on each of the following parties:

in the above-entitled action~~xxx~~:

Clendenen and Lesser
152 Temple Street
New Haven, Connecticut

Zeldes, Needle and Cooper
333 State Street
Bridgeport, Conn.

Connecticut Civil Liberties Union
57 Pratt Street
Hartford, Conn. 06103

the attorney for the

in the said action, by depositing said copies, securely wrapped, properly addressed, and postage fully prepaid, in a post office box regularly maintained by the U. S. Government in the post office at 90 Church Street, in the Borough of Manhattan, City of New York.

Robert McElroy

Sworn to before me this
29th day of October, 19 74

Michael J. Hoops

MICHAEL J. HOOPS
Notary Public, State of New York
No. 30-4603056
Qualified In Nassau County
Commission Expires March 30, 1975

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MILDRED IVES, MOIRA ROBERTSON and JOYCE CHAPMAN, on behalf of themselves and others similarly situated, Plaintiffs-Appellees, vs. W. T. GRANT COMPANY, Defendant-Appellant.	)	No. 74-2131

ERRATA TO BRIEF OF DEFENDANT-APPELLANT

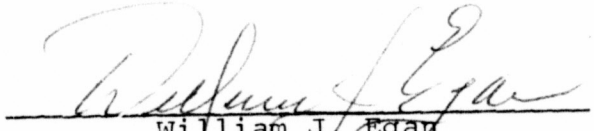
Defendant-appellant W. T. Grant Company respectfully submits the following errata to its brief in the above-entitled matter:

1. p. 4 - Footnote 4 should be entirely deleted.

2. p. 6 - Line 14 should read "word 'exemption' or any other suggestion that an exemp-".

3. p. 46 - Line 1 of the Section heading should read "THE COURT ERRED IN GRANTING INJUNCTIVE".

DEFENDANT-APPELLANT W. T. GRANT CO.

By 

William J. Egan
of Wiggin & Dana
205 Church Street
P. O. Box 1832
New Haven, Connecticut 06508
Attorneys for Defendant-Appellant

CERTIFICATION

This is to certify that on the 23rd day of December, 1974, a copy of the foregoing was mailed, postage prepaid, to William H. Clendenen, Jr., Esq., Messrs. Clendenen & Lesser, 152 Temple Street, New Haven, Connecticut; and Stuart Bear, Esq., Messrs. Zeldes, Needle & Cooper, 333 State Street, Bridgeport, Connecticut.

William J. Egan

William J. Egan
of Wiggin & Dana
205 Church Street
P. O. Box 1832
New Haven, Connecticut 06508